

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States  
Department of Housing and Urban  
Development, on behalf of  
Ana Hernandez, Jessica Hernandez,  
and Julie Hernandez,

Charging Party,

v.

Nelson Mobile Home Park and  
Pat Witmer, Manager of  
Nelson Mobile Home Park,

Respondents

HUDALJ 04-91-0040-1

Decision Issued: December 2, 1993

Deborah Ann Walker, Esquire  
For the Charging Party

Ana Diaz Cordero, Esquire  
For the Respondent

Before William C. Cregar  
Administrative Law Judge

**INITIAL DECISION AND ORDER**

**Statement of the Case**

This matter arose as a result of a complaint filed by Ana Hernandez and her two minor children, Jessica and Julie, ("Complainants"), alleging discrimination based on familial status in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act"). On February 17, 1993, following an investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development ("HUD" or "the Charging Party") issued a charge against Nelson Mobile Home Park ("the Park") and Pat Witmer, the Park's resident manager ("Respondents"), alleging that they had engaged in discriminatory practices in violation of 42 U.S.C. § 3604 (a), (b), and (c) and 24 C.F.R. § 100.50 (b) (2), (3), and (4) by 1) denying Ms. Hernandez an opportunity to purchase a mobile home and rent a lot in the Park, and 2) publishing and relying upon rules and regulations, and

making statements indicating a preference, limitation, or discrimination based on familial status. Respondents allege that the Park qualifies for the exemption for persons 55 and older<sup>1</sup> and, therefore, deny liability.

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<sup>1</sup> 42 U.S.C. § 3607 (b) (2) (C).

A hearing was held in Miami, Florida on July 7, 1993. The parties' post-hearing and reply briefs were filed timely, the last brief having been received by me on September 9, 1993.<sup>2</sup>

### **Findings of Fact**

1. Complainant Ana Hernandez is a divorcee who resides with her two daughters, Jessica and Julie. In July of 1990, Jessica was six years old and Julie was eight years old. Formerly employed as a waitress, she is presently unemployed. Tr. pp. 29-30, 97.<sup>3</sup>

2. Respondent Nelson Mobile Home Park is a mobile home community located in Miami Beach, Florida. It is owned by the general partnership of Jorgar Corp., Danatur Corp., Frajoca Corp., Elias Kobrowski, and Eileen Schecter. It leases mobile home lots to the owners of homes located on the lots and sells mobile homes to prospective purchasers. Answer, ¶ 8; Tr. pp. 190-191. In July 1990, 146 out of the Park's 149 lots were leased. For part of each year, approximately one-half of the tenants reside in Canada or the Northern United States. Most of these tenants live in the Park only between October and April. Res. Ex. O; Tr. pp. 188-189, 215-217. Fifty to seventy-five percent of the Park's residents have sufficient means to live comfortably without financial strain. Tr. pp. 219-220.

4. The Park is divided into rows of mobile homes each of which faces one of five streets. Three of these streets have speed bumps. The Park has installed traffic signs which indicate the direction of travel and limit the speed in the Park to five miles per hour. The Park has installed and maintains street lights. It has also designed and maintains concrete paths which permit wheelchair access out of and into the Park. Tr. pp. 180, 205-206, 231.

5. Some, but not all, mobile homes have sidewalks connecting the street to the front door of the home. These sidewalks were installed and paid for by the tenants. Res. Ex. F-6; Tr. pp. 176.

6. The Park has a handicap accessible clubhouse containing a kitchen, tables and chairs, and a restroom. The restroom has one "grab bar" located next to the commode. The clubhouse is not air-conditioned. Res. Exs. F-3 through F-5; Tr. pp. 165-167, 209.

7. The residents paid for the installation of a petanque<sup>4</sup> court in the only vacant space in

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<sup>2</sup> A comparison of the post-hearing briefs with the record copy of Respondents' Exhibit "N" revealed that the latter was incomplete. Accordingly, on October 13, 1993, I reopened the record requiring Respondents to submit a replacement exhibit through opposing counsel. Respondents' counsel's secretary mistakenly sent the exhibit directly to this office. Accordingly, I sent it to counsel for the Charging Party. I received the replacement Respondents' Exhibit "N" from counsel for the Charging Party on November 4, 1993, on which date the record again closed.

<sup>3</sup> The following reference abbreviations are used in this decision: "C.P. Ex." for Charging Party's Exhibit, "Res. Ex." for Respondent's Exhibit, and "Tr." for Transcript.

<sup>4</sup> This outdoor Canadian game is somewhat similar to lawn bowling.

the Park. The court is now maintained by the Park. Tr. pp. 168-170, 196-198, 231.

8. A bus stop is located outside of the Park's entrance. A park with a playground, picnic tables and chairs, and a shopping mall containing a grocery store, pharmacy, coin laundry, bank, jewelry store, barbershop, restaurants and a book store may be reached from the Park via concrete paths. Res. Exs. F-7, F-8 through F-13, Tr. pp. 51, 177-180.

9. The Park maintains all common areas and the lawns around and between each unit. It employs a handyman who is also available to the tenants for hire. Tr. pp. 174-175.

10. The Park organizes and hosts various social activities throughout the year. These activities consist of biweekly bingo games from October through April, dances at Thanksgiving, Christmas, and New Years, occasional pot-luck dinners and fish frys, and an annual magic show. The Park provides food and recorded music for the holiday dances. Tr. pp. 166, 170, 208. Residents are informed of these events by a bulletin board located in the manager's office. Tr. p. 166.

11. The Park has allowed two private companies, Humana and Airbus, to make presentations to Park residents. Humana is a health maintenance organization. Airbus provides insurance coverage resulting from travel-related accidents or illness by providing return transportation of the insured and his or her auto from the travel location. The Park also allows Meals on Wheels to visit the premises. Tr. pp. 171-172.

12. Ms. Witmer, the resident manager, is accessible 24 hours a day to arrange emergency medical assistance and she has actually provided assistance in emergency situations. She has arranged for ambulances and has called residents' personal physicians. In making her rounds of the Park, she has occasionally discovered tenants who required immediate hospitalization. Tr. pp. 173, 226.

13. All tenants must be approved by the Park manager in order to reside on the premises and must agree to abide by the written "Rules and Regulations." Answer ¶ 9, Tr. pp. 191-193. One of these rules provides that "[t]endency [sic] is limited to ADULTS ONLY, NO CHILDREN." C.P. Ex. 1, ¶ 5 (emphasis in original). This rule has been interpreted and enforced to exclude children under 18 years of age. Another rule limits occupancy to two persons per mobile home, regardless of the size of the home. Answer, ¶ 13, Govt. Ex. 1, ¶ 18; Tr. pp. 191-193.

14. The Park manager informs prospective tenants that the Park is an "adult park," informs them that children under 18 are not allowed, and verifies the prospective tenant's age by glancing at a driver's license, medicare card, or other appropriate document. Tr. pp. 140-142, 147-148, 185-186, 193-195.

15. In approximately June 1990, Ms. Hernandez became interested in purchasing a two-bedroom mobile home located in the Park. She discovered the Park at the time that a man she

was dating, Guy DeMascolo, became interested in purchasing a home in the Park. Ms. Hernandez liked the Park's location adjacent to a playground and to various restaurants where she (a former waitress) believed she could be employed. She was also attracted to the Park because Mr. DeMascolo was planning to live there. During a visit to the Park, she learned from the Park maintenance man that a two-bedroom home was for sale. She also observed a "for sale" sign displayed on the home. She particularly liked that home because it had sufficient space in the back to place a swing set.<sup>5</sup> Tr. pp. 48-52.

16. Ms. Hernandez accompanied Guy DeMascolo to the Park manager's office to inquire about the availability of two mobile homes. Rather than ask about the availability of the home she was interested in, she asked Ms. Witmer a general question concerning the availability of Park-owned units. Ms. Witmer gave a negative reply, but mentioned that some units were for sale by their owners. Ms. Hernandez stated that they were looking for two homes and that she wanted one for herself and her daughters. At this point, Ms. Witmer stated that the Park did not accept children. Ms. Hernandez stated her belief that the Park could not forbid children. Ms. Witmer replied that to her knowledge, this was still an "adult park." Tr. pp. 47-49, 184-185.

17. The night before her conversation with Ms. Witmer, Ms. Hernandez had arranged for a loan of \$10,000 from Mr. DeMascolo's friend, Mike Bloom, for the purchase of the home.<sup>6</sup> Mr. Bloom, with cash-in-hand, met Ms. Hernandez in a Burger King restaurant next to the Park. This meeting occurred on the same day, but some time after, she learned from Ms. Witmer that she could not live in the Park. Accordingly, she told him to return the money to the bank and to call her afterwards because she was worried about him carrying around that much cash.

18. In or around July 1990, Mr. DeMascolo purchased the home which so interested Ms. Hernandez. In the Summer of 1990, this home could have been purchased at a price of \$10,000 or less.<sup>7</sup> Tr. p. 160.

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<sup>5</sup>Ms. Hernandez also considered a two-bedroom mobile home in a mobile home park approximately fifteen blocks from the Park. She rejected this home because one side faced the street, and she was concerned that it would be too easy to break into. Tr. pp. 52-54.

<sup>6</sup>In an attempt to impeach Ms. Hernandez, Respondents introduced the HUD investigator's notes of a conversation with Bloom's brother-in-law, Joe Sardello. According to these notes, the investigator had been told by Ms. Hernandez that Mr. Sardello, rather than Mr. Bloom, was the person who had loaned her the money. These notes further state that Mr. Sardello told the investigator that Ms. Hernandez had indeed approached him about a loan, but that he did not agree to lend her that sum. Res. Ex. L. Ms. Hernandez admits to having asked Mr. Sardello for a loan but was emphatic that Mike Bloom loaned her the \$10,000. Tr. pp. 54-55. Because the investigator did not testify, I am unable to ascertain whether Ms. Hernandez clearly identified Mr. Sardello as the lender to the investigator or whether this might only reflect his own interpretation. Nevertheless, the record establishes that there was a lender. Ms. Hernandez's testimony is corroborated by the testimony of Laya Seghi, a clinical social worker. Ms. Seghi testified that, according to her notes of a June 27, 1990, session with Ms. Hernandez, she was accompanied by a friend whom she believed had bought a home in the Park, and "another friend who was going to lend her money to purchase a trailer." Tr. p. 114.

<sup>7</sup>Ms. Witmer recalls that Mr. DeMascolo purchased the only available two-bedroom that she knew of in the Park. She also recalled that the owner's original asking price was \$10,000. Tr. p. 160.

19. Ms. Hernandez has been diagnosed as suffering from a "manic-depressive" condition. She began experiencing periodic episodes of depression beginning in her early twenties. She underwent psychiatric therapy in her early twenties, and in her early thirties, and again in December 1988 at Jewish Family Services when she began treatment by a psychiatrist and by Laya Seghi, a clinical social worker, for a general condition of depression and anxiety. She has been treated with such anti-depressant drugs as lithium and Prozac.<sup>8</sup> Tr. pp. 39-46. By February 1990, Ms. Seghi, noted a marked improvement in Ms. Hernandez's condition. Her improvement was indicated both by the consistency with which she attended therapy sessions and by her hopefulness about overcoming her status as a welfare mother and her dependency on the welfare system. Tr. p. 112.

20. The improvement in Ms. Hernandez's mental state noted by Ms. Seghi ceased after the Park's refusal to permit her residency. Shortly after this refusal, Mr. DeMascolo and Mr. Bloom were sufficiently concerned about Ms. Hernandez's mental state that they took her to visit Ms. Seghi. Ms. Seghi's June 27, 1990, notes of this visit reflect that Ms. Hernandez was "highly emotional about moving, not moving," and that friends accompanied her "because her emotional state was so agitated that they wanted to see what they could do to help her." Tr. pp. 112-115. Approximately three weeks after the trailer incident, her psychiatrist treated her with Prozac. Three or four weeks later he replaced the Prozac with lithium. He discontinued the lithium treatment after two or three weeks because it made her too sick to eat. Ms. Hernandez credibly testified that, in addition to loss of appetite, she experienced nightmares, woke up crying on some nights, and entertained thoughts of suicide.<sup>9</sup> On one occasion she was hospitalized. She frequently called the emergency hotline, something she never did before the trailer incident. On some days she felt so depressed that she performed routine tasks, such as housework or picking up her children from school, only with difficulty. For a time she did not drive. Her older daughter did not trust her mother to remain alone. She even attempted to learn about her mother's mental condition directly from Ms. Seghi. Tr. pp. 42-46, 62-69, 80-81, 85-86, 116. Her children tried to be supportive. For example, on one occasion, her older daughter, Jessica said to her, "Mommy, don't worry about it. We love you and we don't need that (the mobile home)." Tr. p. 80. Her younger child asked why she was always crying and always had headaches. Tr. p. 78.

21. Approximately one month after the Park's refusal to permit her residency, Ms. Hernandez quit her job as a waitress because she was no longer emotionally able to cope with it. She would cry in front of customers who would ask what was wrong with her.<sup>10</sup> Also at about

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<sup>8</sup> Sometime prior to the Park's refusal to permit her residency, she stopped taking a prescribed anti-depressant which she had taken for approximately one month. Tr. pp. 43-44.

<sup>9</sup> Ms. Hernandez described her suicidal thoughts as "feeling like drowning," or "like a toothache." She was afraid of what would happen to her girls if she actually committed suicide. Tr. pp. 71-72, 75.

<sup>10</sup> After being unemployed for two or three months, she worked as a housekeeper. In February 1992 she had to quit working in order to take care of her older daughter who is diabetic. Tr. pp. 36, 97.

this time, she ended her relationship with Mr. DeMascolo, in part because he moved into the Park and she could not.<sup>11</sup> Tr. pp. 32-26, 43-44, 47-48, 129.

22. Ms. Hernandez's economic circumstances have varied from extreme poverty to material comfort. These economic circumstances, together with her pre-existing mental condition, explain the severity of her reaction following the Park's rejection. She

grew up in extreme poverty. During her childhood she lived in a cardboard shack with her mother and sister. In contrast to her childhood poverty, she and her daughters were materially quite comfortable during her second marriage.<sup>12</sup> Her second husband owned three restaurants and they lived in a house. Tr. p. 61. Since her second divorce in 1989, she and her children have lived in subsidized housing consisting of both one- and three-bedroom apartments. Tr. pp. 61, 102-104 127-128.

### Discussion

On September 13, 1988, Congress prohibited, *inter alia*, discrimination on the basis of familial status, effective March 12, 1989.<sup>13</sup> 42 U.S.C. §§ 3601-19. In amending the Act, Congress recognized that "families with children are refused housing despite their ability to pay for it." H.R. Rep. No. 711, 100th Cong., 2nd Sess. (1988) ("House Report"). In addition, Congress cited a HUD survey that found 25% of all rental units exclude children and that 50% of all rental units have policies that restrict families with children in some way. *See* Marans,

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<sup>11</sup>Ms. Seghi testified as follows:

[B]ecause he was moving into the trailer and she was not able to do that, she saw him in a different light, that he didn't ask her at that point to marry him and that she so much wanted to have this little home, she might I think at that point have wanted to break the relationship because she didn't see any future since he didn't invite her to live in the trailer with him. So I think the relationship on his part was fairly consistent. On her part, because of the housing situation, she now rejected him.

Tr. p. 129.

<sup>12</sup>Ms. Hernandez and her first husband were divorced in 1974 or 1975. Jessica and Julie are the children of her second marriage which ended in divorce in 1989. Tr. pp. 102-103.

<sup>13</sup>Familial status is defined as:

[O]ne or more individuals (who have not attained the age of 18 years) being domiciled with . . . a parent or another person having legal custody of such individual or individuals; or . . . the designee of such parent or other person having such custody, with the written permission of such parent or other person.

*Measuring Restrictive Rental Practices Affecting Families With Children: A National Survey*, Office of Policy, Planning and Research, HUD (1980). The HUD survey also revealed that almost 20 percent of families with children were forced to live in less desirable housing because of restrictive policies. Congress recognized these problems and sought to remedy them by amending the Fair Housing Act to make families with children a protected class.

Accordingly, the Act and HUD regulations make it unlawful, *inter alia*:

- (a) [t]o refuse to . . . rent after the making a bona fide offer, or to refuse to negotiate for the . . . rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . familial status . . .
- (b) [t]o discriminate against any person in the terms, conditions, or privileges of . . . rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . . familial status . . .
- (c) [t]o make, print, or publish, or cause to be made, printed, or published, any notice [or] statement . . . with respect to the . . . rental of a dwelling that indicates any . . . limitation, or discrimination based on . . . familial status . . . or an intention to make any such . . . limitation or discrimination.

42 U.S.C. § 3604 (a), (b), and (c); 24 C.F.R. §§ 100.50 (b), 100.60 (b), 100.65, and 100.75 (a)-(c).

The Act provides two exemptions for "housing for older persons" from its bar against discrimination on the basis of familial status. These exemptions are for housing for persons 62 years of age or older and housing for persons 55 years of age or older, and each exemption has its own tests. Respondents claim that the Park qualifies for the latter exemption. To establish the exemption for housing for persons 55 years of age or older, the housing provider must show that, at the time the discriminatory acts occurred, it satisfied all of the following three requirements: (1) (a) it provided significant facilities and services specifically designed to meet the physical or social needs of older persons, *or* (b) if the provision of such facilities and services was not practicable, that the housing was necessary to provide important housing opportunities for older persons; (2) at least 80 percent of its units were occupied by at least one person 55 years of age or older; and, (3) it had published and adhered to policies and procedures which demonstrate the owner's or manager's intent to provide housing for persons 55 years of age or older. 42 U.S.C. § 3607(b) (2) (C); *HUD v. Holiday Manor Estates Club*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,016, 25,226 (HUDALJ Nov. 26, 1991), *modified on other grounds*, 2 Fair Housing-Fair Lending ¶ 25,027 (HUD Mar. 3, 1992).

The Charging Party has the burden to prove by a preponderance of evidence that Respondents discriminated against families with children. In the instant case un rebutted direct evidence establishes that the Park discriminated against families with children under 18 years of age. Ms. Witmer testified that she told Ms. Hernandez that the Park did not accept children and that it was



an "adult park." In addition, Respondents admit to having a written rule prohibiting children from residing in the Park. C.P. Ex. 1, ¶ 5; Tr. pp. 191-193. Respondents assert that they are within their rights to refuse such occupancy because the Park enjoys the exemption from the Act that applies to housing for persons who are 55 years of age or older. Since the Charging Party proved that Respondents discriminated against families with children under 18 years of age, the burden shifts to Respondents to prove by a preponderance of evidence that the Park qualifies for the "55 and older" exemption. *United States v. Keck*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,673, 16,445 (W.D. Wash. 1990); *HUD v. TEMS Ass'n, Inc.*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,028, 25,307 (HUDALJ Apr. 9, 1992); *HUD v. Murphy*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,002, 25,043-44 (HUDALJ July 13, 1990).

### Significant Facilities and Services

The first test requires that the housing provider demonstrate that it provided significant facilities and services specifically designed to meet the physical or social needs of older persons. *Murphy*, 2 Fair Housing-Fair Lending at 25,043-44. To determine that the facilities and services are significant, a housing provider must show that they have been "designed, constructed, or adapted to meet the particularized needs of older persons," *id.* at 25,044-45, and that the facilities and services indicate a "genuine commitment to serving the special needs of older persons," *U.S. v. Keck*, 2 Fair Housing-Fair Lending at 16,446. To make the required showing three requirements must be met. Respondents must prove 1) that they have a significant number of facilities and services, 2) that the facilities and services exhibit significant design, construction, or adaptation for the handicapped or infirm, and 3) that significant use of the facilities and services is made by or for older persons. *TEMS*, 2 Fair Housing-Fair Lending at 25,308-09.

For purposes of the exemption, a significant number of facilities is provided when tenants are offered many of the facilities and services listed in HUD regulation 24 C.F.R. § 100.304 (b) (1). This regulation provides that:

"Significant facilities and services specifically designed to meet the physical or social needs of older persons" include, but are not limited to, social and recreational programs, continuing education, information and counseling, recreational, homemaker, outside maintenance and referral services, an accessible physical environment, emergency and preventive health care . . . programs, congregate dining facilities, transportation to facilitate access to social services, and services designed to encourage and assist residents to use the services and facilities available to them.

24 C.F.R. § 100.304 (b) (1).

The only facilities that the Park furnishes are a clubhouse and a petanque court.<sup>14</sup> As for services, it sponsors social events only occasionally and only from October through April. It provides referral services only to the limited extent of contacting the 911 emergency hotline or the individual's own health provider in the event of an emergency, making the Park handyman available for private hire, and making arrangements with Meals on Wheels. The only other service that the Park provides is 24 hour access to the resident manager. The Park does not furnish recreational services, continuing education programs, information and counseling services, homemaker services, emergency and preventive health care programs, a completely accessible physical environment, congregate dining facilities, or transportation services. Accordingly, the record fails to establish that the Park furnishes a significant number of these facilities and services.<sup>15</sup>

The Park's facilities and services do not exhibit significant design, construction, or adaptation for the handicapped or infirm. Such facilities and services must evidence a "genuine commitment to serving the special needs of older persons," i.e., persons with physical limitations, health problems or considerable leisure time. *Keck*, 2 Fair Housing-Fair Lending at ¶ 16,446; *Murphy*, 2 Fair Housing-Fair Lending at ¶ 25,045. The Park provides an environment which is only partially accessible to the handicapped. Unless installed by individual tenants, the Park lacks sidewalks. As a result, physically disabled persons must use the streets. Three of the five Park roads have speed bumps that inhibit the use of wheelchairs. Handicap access to individual units from the street exists only if the owners have installed ramps. While the clubhouse is accessible to wheelchairs, it may not be used throughout the South Florida summer by older persons with health limitations because it is not air-conditioned. The clubhouse restroom lacks dual handrails. Instead, there is only one "grab bar" located at a right angle to the commode. The only structure outside of the clubhouse available for recreation is the petanque court. The Park merely maintains this facility, which was designed, constructed, and paid for by Canadian residents. Three holiday dinners, a magic show, and bingo games two evenings a week do not begin to fill the considerable leisure time typically available to older residents. Even these occasional events, with the possible exception of pot-luck dinners, occur only during the October through April period when the Park is fully occupied. Finally, the Park's furnishing

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<sup>14</sup>The adjacent shopping center with its laundry facility, restaurants, and stores is not a Park facility and cannot be "incorporated" by the Park to make its required demonstration. See *Murphy*, 2 Fair Housing-Fair Lending at ¶ 25,046. Similarly, the fact that the Park permits access by various private concerns, such as Humana and Airbus, does not permit the Park vicariously to claim them as services which it provides. See *HUD v. Ocean Parks Condominium Ass'n, Inc.*, 2 Fair Housing - Fair Lending (P-H) ¶ 25,054, 25,520 (HUDALJ Aug. 20, 1993), *appeal pending* (11th Cir.) (No. 93-5058).

<sup>15</sup>The housing provider in *TEMS*, furnished more facilities and services than does the Park. In addition to the Park's facilities and services, the *TEMS* facilities included a pool, six shuffleboard courts, a horse shoe court and picnic area. The clubhouse included a card room, television, library, and restroom facility with handicap railings. Services included continuing education courses, guest speakers, weekly transportation to a shopping center, coordinated nursing services, arts and crafts, out-of-town trips, and a newsletter. Even these facilities and services were insufficient in number to satisfy the "significant facilities and services" test. 2 Fair Housing-Fair Lending at ¶ 25,304-05 and ¶ 25,309.

of a bulletin board, its maintenance of common areas, and 24 hour availability of the site manager are merely the types of amenities that any landlord might provide to please tenants, and they are not unique to a community of older persons. See *Park Place Home Brokers v. P-K Mobile Home Park*, 773 F. Supp. 46, 51-52 (N.D. Ohio 1991); *Ocean Parks*, 2 Fair Housing-Fair Lending at ¶ 25,519.

Respondents have not proved that the facilities and services were used to a significant degree by older persons. No evidence was presented on the frequency of use by older persons of the clubhouse and petanque court or the attendance by older persons of the Park-sponsored activities.

### The "Practicability" and "Important Opportunity" Tests

If a housing provider fails to demonstrate that it provides significant facilities and services to older persons, it may yet satisfy the "significant facilities and services test" by demonstrating that it is impracticable to provide significant facilities and services *and* that its housing is necessary to provide important opportunities for older persons. 42 U.S.C. § 3607 (b) (2) (C) (i); 24 C.F.R. § 100.304 (b) (2). This alternative was created for "those unusual circumstances where housing without such facilities and services provides important housing opportunities for older persons." 134 Cong. Rec. S10456 (daily ed. Aug. 1, 1988). The HUD regulation identifies seven factors to be considered in determining whether a housing facility meets this alternative. The seven factors are: (1) whether the owner or manager of the facility has endeavored to provide significant facilities and services designed to meet the physical or social needs of older persons; (2) the amount of rent charged, if the dwellings are rented, or the price of the dwellings if they are offered for sale; (3) the income range of the residents; (4) the demand for housing for older persons in the area; (5) the range of housing choices for older persons in the area; (6) the availability of other, similarly priced housing for older persons in the area; and (7) the vacancy rate of the facility. 24 C.F.R. § 100.304 (b) (2).

The first factor relates to the "practicability" part of the test. Respondents did not provide evidence 1) that they ever endeavored to provide such facilities and services, 2) that the costs of providing these facilities or services exceeded the Park's ability to afford such costs, or 3) that any estimated additional assessed costs to the tenants of such facilities and services would exceed their ability to pay for them. Indeed, Respondents provided no financial data relating to the costs of providing facilities and services or the financial impact on tenants of incurring these costs.

Respondents assert that the lack of additional space precludes the addition of features such as a swimming pool or a library. Tr. p. 223. This contention misapprehends the nature of the "practicability" test. Housing providers are not necessarily required to construct new facilities. In many cases modifications of existing structures would evidence an intention to accommodate older persons. In addition, the addition of education, counseling, recreational, and preventive health care programs, to use a few examples, would not necessarily require the addition of new facilities. Thus, Respondents fail to meet the impracticability test because they

made no effort to provide facilities and services or even to assess their feasibility. *See Keck*, 2 Fair Housing-Fair Lending at 16,446; *Holiday Manor*, 2 Fair Housing-Fair Lending at 25,228; *Murphy*, 2 Fair Housing-Fair Lending at 25,047-48.

The remaining six factors set forth in the HUD regulation relate to the "important opportunity" part of the test. It is not necessary to reach this part of the test unless Respondents have demonstrated that they endeavored to provide significant facilities and services.<sup>16</sup> Nevertheless, consideration of the record in light of the remaining six factors reveals that the Park has not demonstrated that it provides a significant housing opportunity for older persons in the community. In 1990 the Park charged a \$170 per month lot rent. In the surrounding area in 1990 one-bedroom apartments rented for \$400 per month and two-bedroom apartments for \$500 per month. The record does not reflect whether these rentals included utility costs. Res. Ex. I.<sup>17</sup> Because there is no evidence of the average sales price or monthly payments and the average utility (presumably electricity) cost, the record does not reflect the comparative costs of residing in the Park *vis a vis* the purchase of a single family home or condominium or the rental of an apartment. Approximately fifty percent of the Park residents are sufficiently well off to own a second home and can afford to make a semi-annual journey from Miami to the Northeastern United States or Canada. According to Ms. Witmer, between fifty and seventy-five percent of the residents have no financial problems and could presumably afford more expensive housing. Tr. pp. 219-220. Finally, while the record establishes the presence of a large population of older persons in the North Miami Beach area, and that the Park is full in the winter, it also reflects that approximately 10 to 12 lots are vacant during the summer. Tr. p. 220.

Accordingly, Respondents have failed to demonstrate either that it was impracticable for them to furnish significant facilities and services for older persons, or that the Park afforded an important housing opportunity for older persons.

### The 80 Percent Occupancy Test

In order to satisfy the occupancy requirement, the housing provider must present reliable evidence that 80% of the mobile homes in the Park were occupied by at least one person 55 years of age or older in the Summer of 1990. *See TEMS*, 2 Fair Housing-Fair Lending at 25,307-08. Respondents failed to do so.

Respondents' evidence consists of three exhibits. Respondents' Exhibit "O" is a computer-generated listing of Park tenants by lot number as of July 1990. It does not include the

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<sup>16</sup>"This test only comes into play if the 'impracticability' test has been satisfied. It is designed to deal with the unusual situation where a community not meeting the tests of § 3607(b)(2)(C) will still be allowed to exclude families with children because the older persons in the area are deprived of affordable housing." *Murphy*, 2 Fair Housing-Fair Lending at ¶ 25,048.

<sup>17</sup>I note the availability of subsidized rental housing in the immediate vicinity. While there were long waiting lists for this housing, there is no indication of turnover rate. Res. Ex. J.

tenants' ages. Respondents' Exhibit "N" consists of 65<sup>18</sup> affidavits collected from Park residents<sup>19</sup> in late March 1992. These affidavits identify the name of the affiant, his or her lot number, and date of birth. Most, but not all, attach a legible copy of a driver's license or other document from which the affiant's age may be determined. The third exhibit, Respondents' Exhibit "P," is a June 12, 1991, computer-generated listing by name and unit number on which Ms. Witmer wrote in the ages of the occupants based upon her review of Park records existing at that time or upon her own interviews of tenants. Tr. pp. 301-302. Respondents argue that it is possible to reconstruct the age of the Park population in July 1990 by comparing the affidavits and Ms. Witmer's survey with the July 1990 computer-generated list of tenants. I disagree.

Respondents' Exhibits "N" and "P" are unreliable. Of the 65 affidavits, 16 have no proof-of-age documentation attached.<sup>20</sup> Illegible documentation is attached to 12 of the remaining affidavits.<sup>21</sup> One of the affidavits, that of Ms. Cummings in unit E-501, is not notarized. Two affidavits, that of Joseph Lalonde and Marietta Legault, apply to only one unit. The claimed ages of the occupants of 38 additional units lack supporting documentation.<sup>22</sup>

Even if Exhibits "N" and "P" are reliable, they account for only seventy percent of the leased lots during the relevant period. In July 1990, the Park's business records indicate that it leased 145 lots. There is no evidence which even purports to establish the ages of the occupants of more than 102 of these lots. Accordingly, even if all of the

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<sup>18</sup> Respondents' Exhibit "N" actually contains 67 affidavits. I have disregarded one of them because the affiant does not claim to have resided in the Park in July 1990 (Charles Hardy in unit A-106). I have also disregarded a second because the name of the affiant does not correspond to the resident identified as living in the same unit on Respondents' Exhibit "O" (Daniel Reardon in unit B-218).

<sup>19</sup> An additional 20 affidavits were executed in March 1992 by individuals who claim to have lived in the Park in July 1990, but whose names do not appear on Respondents' Exhibit "O." These could be sublessees of owners whose names appear on that exhibit; it is not possible to say for sure. According to Respondents' counsel, "Problem is affidavits taken on 3/1992 tenants moved, park changed some numbering and others on list Exhibit O are owners who rented." List of Nelson Mobile Home Park's Tenants as of July, 1990 (included with resubmission of Res. Ex. N., *see supra* note 2).

<sup>20</sup> These are the affidavits of Grace Bilotta, Robert Lynch, Marianne Kornfield, Bewah Peters, Stephanie Bramsley, Marceur Denis, Gerald LaBelle, Catherine Apisson, Albert Pare, Marie Molinare, Paul Audair, Coralia Collazo, Jean Bourdages, Josephine Ziegler, Marion Wise, and Elizabeth Heller.

<sup>21</sup> The 12 affidavits are from Gloria Rafuls, Grace Meyer, Rosalyn Mullen, John Bower, Joseph Parriso, Leslie Simpson, Robert Angell, Hugoberto Bermudez, Armanotine Vinet, Joseph Ripnich, Hymie Segal and Peter Patner.

<sup>22</sup> Respondents assert that these ages as set forth in Respondents' Exhibit "P" are established by Ms. Witmer's reconstruction based on her review of existing records and her interviews of residents. This document is inherently unreliable as it was prepared for litigation by the Park's management (a hearing before the Metro Dade Center, Equal Opportunity Board, *see infra* note 24), and the source documentation is unavailable. *See Ocean Parks*, 2 Fair Housing-Fair Lending at 25,517.

102 units were occupied by an individual 55 or older,<sup>23</sup> Respondents have failed to demonstrate that at least eighty percent of its units were occupied by at least one person 55 or older.<sup>24</sup>

### Publication and Adherence to Policies and Procedures

The third statutory test requires the housing provider to demonstrate that it published and adhered to policies and procedures which demonstrated an intent to provide housing for persons 55 years or older. Six factors set forth in HUD's regulations are to be used in determining whether a housing facility meets this requirement. These six factors are: (1) written rules and regulations; (2) the manner in which the housing is described to prospective residents; (3) the nature of advertising; (4) age verification procedures; (5) lease provisions; and (6) the actual practices of the owner or manager in enforcing relevant lease provisions and relevant rules and regulations. 24 C.F.R. § 100.304(c)(2).

These tests are designed to establish whether a housing provider has demonstrated an intent to provide housing for persons 55 or older by its adoption and adherence to policies and procedures which manifest that intent. The focus of the tests is on whether: (1) the housing provider holds itself out as providing housing for persons 55 or older, and (2) the housing provider has demonstrated that it has consistently done so.

*Murphy*, 2 Fair Housing-Fair Lending at 25,050; *see also Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc.*, 3 F.3d 1472, 1476 (11th Cir. 1993).

The record evidence establishes that, rather than demonstrating an intent to provide housing for persons 55 and older, the focus of Respondents' regulations, description to prospective residents, and age verification procedures was merely to exclude children under 18.<sup>25</sup>

The Park's regulations prohibiting children do not thereby demonstrate an intention by the housing provider to provide housing for older persons, "because then any policy against

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<sup>23</sup> If credited, Respondents' exhibits would show that the units occupied by Robert Lynch, Leon Arguin, Maddox Galvin, Huberto Bermudez, Hector Santiago, Jean Carrier and Muriel Lortie were the only ones in which no occupant was 55 or older.

<sup>24</sup> On February 25, 1993, the Metro-Dade County Equal Opportunity Board issued a report of the findings of its investigation into a Charge brought by Ms. Hernandez. It concluded based on affidavits presented to it that at least eighty percent of the Park's units were occupied by at least one person 55 or older and recommended dismissal of the charge. Res. Ex. C. I have no way of knowing what additional evidence was before the Board. Accordingly, I am not bound to reach the same result.

<sup>25</sup> Because the Park does not advertise, and because lease provisions were not included in the record, I have not addressed factors (3) and (5).

families would suffice for the exemption, swallowing the rule against such discrimination." *Id.* at 1479. Respondents' "Rules and Regulations," effective in early 1990, fail even to mention that at least one occupant of a unit must be 55 and older. C.P. Ex. 1. Rather, they state that tenancy "is limited to adults only, no children." C.P. Ex. 1 ¶ 5 (underlining in original). Ms. Witmer testified that Respondents interpreted the term "adult" and "children" to mean anyone, respectively, over and under 18 years of age. Tr. pp. 185-186, 191-193. In response to a hypothetical question, she testified that persons under 55 would be permitted to live in the Park provided that at least eighty percent of the units were occupied by one person 55 or older, but that children would not be permitted. Tr. pp. 186-187.

Similarly, the manner in which Respondents described the Park to applicants does not evidence the requisite intent. Ms. Witmer did not inform applicants that the Park was a senior community for persons 55 and older. Rather, as her conversation with Ms. Hernandez illustrates, she informed them that children, i.e., persons under 18, were not permitted, or that the Park was "adult." Tr. pp. 140-141, 147-148, 185-186.

Respondents introduced several letters purporting to show that the Park held itself out as an adult community for persons 50 years of age, that after 1988, increased to 55 or older. Res. Ex. A; Tr. pp. 134-139. These letters fail to establish that the Park described itself as a Park for persons 55 and older. The letters, written by managers or owners of the Park to Park residents or former residents, indeed, contain statements that persons under 50 or 55 (depending on the year) are not allowed to live on the premises. However, the letters also evidence that the Park's primary concern was the enforcement of a long-standing policy excluding children. Res. Exs. A, A-1, A-3. A letter of May 8, 1989, is the only one that supplies evidence of the Park's policy after the effective date of the Act. The letter requests an owner of a unit who had rented to a couple with a child to ask the couple to quiet the child at night. The letter recites Park policy and, indeed, includes a statement that a lessee must be 55 and older. However, the purpose of the letter is to advise the addressee that this child will be allowed to remain if no further complaints are received, but that no further children will be permitted. Res. Ex. A-2. Accordingly, this letter does not establish that Respondents held themselves out as a community for persons 55 and older.

Finally, Respondents' age verification procedures were geared to determining whether prospective tenants were over 18, not whether they were 55 or older. Applicants were, indeed, required to state the date of birth of each prospective tenant on the application and to show proof of age with a driver's license, passport, medicare card or birth certificate. However, Ms. Witmer's testimony establishes that her verification of the date of birth was to insure that the applicant was over 18 years of age, not whether he or she was 55 or older. Tr. pp. 193-195. Accordingly, Respondents have failed to demonstrate that the Park holds itself out as providing housing for persons 55 or older, and that it has consistently done so.

#### Discriminatory Statements

Title 42 U.S.C. § 3604 (c) provides that it shall be unlawful to:

[M]ake, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . familial status . . . or an intention to make any such preference, limitation, or discrimination.

Since Respondents have failed to demonstrate that the Park qualifies for the exemption for persons 55 and older, its printing or causing to be printed, and its publication of a rule limiting tenancy to "adults only, no children," are a notice and statement with respect to the sale or rental of a dwelling that indicate a preference, limitation, or discrimination based on familial status, as well as an intention to make such a preference, limitation or discrimination. In addition, Ms. Witmer's replies to Ms. Hernandez's inquiry that the Park did not accept children and that it was an "adult park," are statements with respect to the sale or rental of a dwelling that indicate a preference, limitation, or discrimination based on familial status as well as an intention to make such a preference, limitation or discrimination.

### Conclusion

Respondents have failed to demonstrate that the Park provided (1) (a) significant facilities and services specifically designed to meet the physical or social needs of older persons, that (b) the provision of such facilities and services was impracticable, or that the housing was necessary to provide important housing opportunities for older persons; (2) that at least eighty percent of its units were occupied by at least one person 55 years of age or older; and, (3) that it published and adhered to policies and procedures demonstrating the owner's or manager's intent to provide housing for persons 55 years of age or older. In addition, the record demonstrates that Respondents published and relied upon rules and regulations and made statements indicating a preference, limitation, or discrimination based on familial status. Accordingly, by denying

Ms. Hernandez an opportunity to purchase a mobile home and rent a lot in the Park, Respondents violated 42 U.S.C. § 3604 (a), (b) and 24 C.F.R. § 100.50 (b) (2) and (3). By relying upon rules and regulations and making statements indicating a preference, limitation, or discrimination based on familial status, Respondents violated 42 U.S.C. § 3604 (c) and 24 C.F.R. §§ 100.50 (4) and 100.75 (a) and (b).

### **Remedies**

Having found that Respondents have engaged in discriminatory housing practices, Complainants are entitled to "such relief as may be appropriate, which may include actual damages . . . and injunctive or other equitable relief." 42 U.S.C. § 3612 (g) (3). Respondents may also be assessed a civil penalty "to vindicate the public interest." *Id.* The Charging Party seeks \$30,000 to compensate Ms. Hernandez for emotional distress, and civil penalties against the Park and Ms. Witmer in the amounts, respectively, of \$5,000 and \$25.

### Emotional Distress



Although "courts do not demand precise proof to support a reasonable award of damages [for emotional distress]," *Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241, 1245 (8th Cir. 1983), such damages may be inferred from the circumstances of the discrimination, as well as established by testimony. *See Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974); *see also HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,001, 25,011-13 (HUDALJ Dec. 21, 1989), *aff'd*, 908 F.2d 864, 872-73 (11th Cir. 1990). As a threshold matter, there must be a showing that respondent's discrimination caused complainant's mental distress. *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977); *Morgan v. HUD*, 985 F.2d 1451, 1459 (10th Cir. 1993). Once causation has been demonstrated, key factors in determining the amount of compensation for emotional distress are the complainant's reaction to the discriminatory conduct and the egregiousness of respondent's behavior. *HUD v. Properties Unlimited*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,009, 25,151 (HUDALJ Aug. 5, 1991).

A preponderance of evidence establishes that the Park's rejection of Ms. Hernandez's attempt to purchase a mobile home in the Park aggravated her pre-existing mental condition, thereby causing her to relapse into a state of depression. Ms. Seghi's notes indicated that she had steadily improved and was beginning to feel a sense of hopefulness from the time she began her treatments at Jewish Family Services in 1988. Ms. Seghi's notes of June 27, 1990, reflect that she had reached a state of intense emotional excitement that she connected with purchasing a home in the Park. After the incident she went into "a deep depression." Tr. p. 112. She discontinued therapy on a regular basis. She quit her job one month after the incident, and told Ms. Seghi that her perception of the hopelessness of her situation had been renewed. Ms. Seghi described her condition in September 1990 as a "very deep depression" and recommended psychiatric consultation. *Id.* After the incident her elder child reacted to her loss of the housing opportunity by trying to comfort her - even attempting to act as a surrogate mother. Following a long, consistent period of recovery, she displayed only a sporadic interest in further counseling.

Respondents suggest other possible causes for the recurrence of Ms. Hernandez's depression during this period. They note that she broke off her relationship with Mr. DeMascolo after he declined to marry her and that she stopped taking a prescribed mild anti-depressant shortly before the incident. I credit Ms. Seghi's testimony that Ms. Hernandez's breakup with Mr. DeMascolo was a result rather than a cause of her depression. Tr. pp. 128-129. Finally, Respondents' suggestion that her relapse resulted from her failure to continue taking her prescribed anti-depressant is unsupported by medical or other evidence that stopping the mild anti-depressant would cause this result. Accordingly, I conclude that a preponderance of evidence establishes that Respondents' conduct aggravated Ms. Hernandez pre-existing mental condition, thereby causing the severe mental distress she experienced.

The record in this case provides substantial evidence of psychic harm to Ms. Hernandez. She is a poor, single mother of two who has been diagnosed and treated for a

manic-depressive condition. By February 1988, she was on her way to recovery. A significant barrier to her overcoming her condition stems from her feeling of helplessness or powerlessness in overcoming her circumstances, i.e., parenting and dependency on the welfare system. The Park's refusal to permit her residency could only have reinforced this barrier. Economically well-off in her second marriage, by the summer of 1990 she faced the unrelieved prospect of raising two girls relying on her income as a waitress and/or her welfare payments. Having personally experienced extreme poverty, she intensely felt the change in her fortunes and its impact on her children. This background explains the *psychic* importance to Ms. Hernandez of adequate shelter. I credit her testimony and that of Ms. Seghi, that Ms. Hernandez had become obsessed with the desire to reconstruct her former circumstances by owning her own home, with a backyard and swings for her girls.<sup>26</sup>

The apparent availability of the home, together with a loan with which to pay for it, caused her to reach a considerable level of excitement. Having reached this state, she was shattered by Respondents' refusal to permit her to live in the Park with her children. Her condition underwent a sea change from recovery to relapse. Ms. Seghi summarized Ms. Hernandez's view of the world after this incident: "See, there's no use trying; you try so hard, and where do you get, because look what happens. You even have the money finally to purchase and the whole system is against you." Tr. p. 116-117.

I credit Ms. Hernandez's testimony that, following the incident, she suffered loss of appetite, would wake up crying on some nights, and entertained thoughts of suicide. On several occasions she would call the emergency hotline, and on some days she felt so depressed that she performed routine tasks, such as housework or picking up her children from school, only with difficulty. Tr. pp. 62-68, 85-86. By having to witness her children's attempts to minister to her, Ms. Hernandez also suffered vicariously through her children.

Ms. Hernandez moved into a new apartment in or about February 1991. Thereafter she began to recover. Tr. pp. 119-120. Accordingly, damages for emotional distress are appropriate for a period beginning in June 1990 and ending in February 1991.

Housing discriminators must take their victims as they find them and damages must be awarded based upon the injuries actually suffered by the victim. *HUD v. Kelly*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,034, 25,362 (HUDALJ Aug. 5, 1991), *remanded on other grounds*, 3 F.3d 951 (6th Cir. 1993). Because Ms. Hernandez has a diagnosed manic-depressive condition, she has a vulnerable constitution and, accordingly, suffered far more than an ordinary person faced with these circumstances. Thus, this case presents a different situation from cases in which the egregiousness of the housing provider's conduct has resulted in large awards,<sup>27</sup> and

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<sup>26</sup> Ms. Seghi referred to Ms. Hernandez's desire to own a home with a backyard and swings for the girls as "her number one dream." I also note that Ms. Seghi recorded during her June 27, 1990, counseling session, that Ms. Hernandez was "highly emotional about moving," and that friends accompanied her "because her emotional state was so agitated that they wanted to see what they could do to help her." Tr. p. 114.

<sup>27</sup> Respondent's conduct in denying Ms. Hernandez access to the Park does not rise to the level of

those cases in which only a modest recovery is warranted because conduct was not egregious and the victim did not have a vulnerable constitution.<sup>28</sup> Rather, this case presents the "eggshell plaintiff" situation, i.e., even though the conduct of the housing provider was not particularly egregious, the affected victim was devastated by virtue of her pre-existing mental condition.

Based on my review of the evidence of emotional distress in this case in light of the range of damage awards for emotional distress in the cases noted above, I conclude that Ms. Hernandez is entitled to be compensated in the amount of \$30,000<sup>29</sup> for emotional distress for the period between June 1990 and February 1991.

### Civil Penalty

To vindicate the public interest, the Act also authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. § 3612 (g) (3) (A); 24 C.F.R. § 104.910 (b) (3). Determining an appropriate penalty requires consideration of five factors: (1) the nature and circumstances of the violation; (2) the goal of

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egregiousness of those cases in which significant damages have been awarded for emotional distress. Thus, Respondents did not publicly humiliate the complainant, repeatedly harass or threaten her, or otherwise engage in notorious misconduct unlike the housing providers in a number of cases. *See e.g., Littlefield v. McGuffey*, 954 F.2d 1337 (7th Cir. 1992) (\$50,000 awarded to victim under Illinois tort law resulting from racially motivated intentional infliction of emotional distress); *HUD v. Tucker*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,033, 25,350 (HUDALJ Aug. 24, 1992) (\$50,000 in damage awarded for significant emotional distress and inconvenience to each of the victims caused by egregious acts of racial discrimination on the part of Respondents), *appeal pending* (9th Cir.); *HUD v. Cabusora*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,026, 25,292 (HUDALJ Mar. 23, 1992) (\$25,000 awarded for *inter alia* racially motivated constructive eviction and public humiliation); *Blackwell*, 2 Fair Housing-Fair Lending at 25,014-15 (\$20,000 for one couple and \$40,000 another couple for embarrassment, humiliation and emotional distress resulting from racially motivated refusal to sell).

<sup>28</sup> *See e.g., HUD v. Jeffre*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,020, 25,258 (HUDALJ Dec. 18, 1991) (\$1,500 emotional injury award against housing provider who denied rental opportunity because of familial status where complainant "did not appear to be a person of vulnerable constitution"); *HUD v. Baumgardner*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,006, 25,100-01 (HUDALJ Nov. 15, 1990) (\$500 for emotional distress awarded to male denied housing opportunity because of his sex who also apparently lacked a "vulnerable constitution"), *modified on other grounds*, 960 F.2d 572 (6th Cir. 1992).

<sup>29</sup> *Cf. HUD v. Jerrard*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,005 (HUDALJ Sept. 28, 1990), which also involved a vulnerable plaintiff. In that case \$15,000 in damages was awarded for emotional distress to a victim who was constructively evicted from her home because of race discrimination and who suffered from a pre-existing mental condition which interfered with her ability to trust others. Respondents' conduct was not as egregious as that of the *Jerrard* housing provider. However, the *Jerrard* victim did not manifest the extreme psychological devastation experienced by Ms. Hernandez whose suffering was so severe that a greater award is warranted despite the absence of egregious conduct on the part of the housing provider.

deterrence; (3) whether a respondent has previously been adjudged to have committed unlawful housing discrimination; (4) a respondent's financial resources; and (5) the degree of respondent's culpability. See *HUD v. Jerrard*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,005, 25,092 (HUDALJ Sept. 28, 1990); *Blackwell* 2 Fair Housing-Fair Lending at 25,014-15; House Report at 37.

### Nature and Circumstances of the Violation

I conclude that Respondent Nelson Mobile Home Park advanced the claim that it was a Park for persons 55 and older as a pretext for excluding families with children. I base my conclusion on the dearth of support for its claim that it qualified for the exemption. This lack of support for the claim should have become obvious to the Park which, because it is a professional housing provider, should have become aware of its failure to qualify for the "55 and older exemption" as more and more interpretations of the statutory phrases "significant facilities and services" and "adherence to published policies and procedures" became available.<sup>30</sup> Respondent's failure to react to these developments causes me to conclude that its claim that it met the "55 and older exemption" was pretextual at the time it was made in June 1990. Accordingly, a significant civil penalty should be imposed in this case.

### Deterrence

The Park and other similarly situated housing providers need to be deterred from engaging in any form of discriminatory treatment of families with children. Housing providers must understand that they cannot justify discrimination using pretextual claims that they qualify for exemptions under the statute. Imposition of an appropriate civil penalty should send a clear message that discrimination based on familial status is "not only unlawful but expensive." *Jerrard*, 2 Fair Housing-Fair Lending at 25,092.

### Respondent's Previous Record

There is no evidence that the Park previously has been found to have committed an unlawful discriminatory housing practice. Consequently, the maximum civil penalty that may be assessed against Respondent is \$10,000, pursuant to 42 U.S.C. § 3612 (g) (3) (A) and 24 C.F.R. § 104.910 (b) (3) (i) (A).

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<sup>30</sup> *HUD v. Murphy*, 2 Fair Housing-Fair Lending ¶ 25,002, became a final decision of the Department in August 1990. *United States v. Keck*, 2 Fair Housing-Fair Lending ¶ 15,673, was decided in November 1990. *HUD v. TEMS*, 2 Fair Housing-Fair Lending ¶ 25,028, became final in May 1992.

In drawing this conclusion I am assuming that Respondents believed they could produce reliable evidence that eighty percent of the units were occupied by a person 55 or older. Even with reliable evidence

to support that contention, the Park would fail to qualify for the exemption. See *Holiday Manor Estates*, 2 Fair Housing-Fair Lending at 25,226.

### Respondent's Financial Circumstances

Evidence regarding a respondent's financial circumstances is peculiarly within its knowledge, so it has the burden of introducing such evidence into the record. If it fails to produce credible evidence militating against assessment of a civil penalty, a penalty may be imposed without consideration of its financial circumstances. *See Campbell v. United States*, 365 U.S. 85, 96 (1961); *Jerrard*, 2 Fair Housing-Fair Lending at 25,092; *Blackwell*, 2 Fair Housing-Fair Lending at 25,015. The record does not contain any evidence indicating that Respondent could not pay a civil penalty without suffering undue hardship.

### Culpability

Respondent Nelson Mobile Home Park is responsible for the decision to exclude children and the promulgation of rules and regulations and statements implementing that exclusion. Through its agent, Ms. Witmer, it is also responsible for making discriminatory statements to Ms. Hernandez. I conclude that the \$5,000 civil penalty sought by the Charging Party against Respondent Nelson Mobile Home Park is justified under the circumstances of this case and will vindicate the public interest.

I further conclude that the evidence is insufficient to conclude that Ms. Witmer, the Park's resident manager, was responsible for the Park's decision to discriminate against families with children in or around June 1990 or that at that time she had actual or constructive knowledge that the Park's policy violated the Act. Accordingly, I decline to impose a civil penalty against Ms. Witmer.

### Injunctive Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and protect the public interest in fair housing.<sup>31</sup> 42 U.S.C. § 3612 (g) (3). The purposes of injunctive relief include the following: eliminating the effects of past discrimination, preventing future discrimination, and positioning the aggrieved persons as close as possible to the situation they would have been in, but for the discrimination. *See Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). Once a judge has determined that discrimination has occurred, he or she has "the power as well as the duty to use any available remedy to make good the wrong done." *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975) (citations omitted). The injunctive provisions of the following Order serve all of these purposes.

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<sup>31</sup>"Injunctive relief should be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." *HUD v. Blackwell*, 908 F.2d 864, 874 (11th Cir. 1990) (quoting *Marable v. Walker*, 704 F.2d 1219, 1221 (11th Cir. 1983)).

**ORDER**

Having concluded that Respondents Nelson Mobile Home Park and Pat Witmer violated provisions of the Fair Housing Act that are codified at 42 U.S.C. §§ 3604 (a)-(c), as well as the regulations of the U.S. Department of Housing and Urban Development that are codified at 24 C.F.R. §§ 100.50 (b) (1)-(4), 100.60 (b) (1)-(2), 100.65, and 100.75 (a)-(c), it is hereby

**ORDERED** that,

1. Respondents are permanently enjoined from discriminating, with respect to housing, because of familial status, and from retaliating against or otherwise harassing Complainants. Prohibited actions include, but are not limited to:

a. refusing or failing to rent a dwelling, or refusing to negotiate for the rental of a dwelling, to any person because of familial status;

b. otherwise making unavailable or denying a dwelling to any person because of familial status;

c. discriminating against any person in the terms, conditions, or privileges of the rental of a dwelling, or in the provision of services or facilities in connection therewith, because of familial status;

d. making, printing, or publishing, or causing to be made, printed, or published, any notice, statement, or advertisement with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination based on familial status;

e. coercing, intimidating, threatening, or interfering with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the Fair Housing Act;

f. retaliating against the Complainants or anyone else for their participation in this case or for any matter related thereto.

2. Respondent Nelson Mobile Home Park shall institute record keeping which is adequate to comply with the requirements set forth in this Order, including keeping all records described in paragraph three of this Order. Respondent Nelson Mobile Home Park shall permit representatives of HUD to inspect and copy all pertinent records at reasonable times after reasonable notice.

3. On the last day of every third month beginning with the month this decision becomes

final and continuing for three years, Respondent Nelson Mobile Home Park shall submit reports containing the following information regarding the previous three months, for all properties owned or otherwise controlled by Respondent, to HUD's Atlanta Regional Office of Fair Housing and Equal Opportunity, 75 Spring Street, S.W., Atlanta, Georgia 30303-3388, provided that the director of that office may modify this paragraph of this Order, as deemed necessary to make its requirements less, but not more, burdensome:

- a. a duplicate of every written application, and written description of every oral application, for all persons who applied for purchase or lease of any mobile homes or lots, including a statement of the person's familial status, whether the person was rejected or accepted, the date of such action, and, if rejected, the reason for the rejection;
- b. a list of vacancies at all Park mobile homes or lots including the departed person's familial status, the date of termination notification, the date moved out, the date the mobile home or lot was next committed to occupancy, the familial status of the new occupant, and the date that the new occupant moved in;
- c. current occupancy statistics indicating which of the mobile homes are occupied by families or groups including children under 18 years old;
- d. sample copies of any advertisements published or posted during the reporting period, including dates and what, if any, media was used, or a statement that no advertising was conducted;
- e. a list of all persons who inquired in any manner about renting or buying one of the mobile homes, including their names, addresses, familial status, and the dates and dispositions of their inquiries; and
- f. a description of any rules, regulations, leases, or other documents, or changes thereto, provided to or signed by any applicants seeking occupancy at Nelson Mobile Home Park.

4. Respondent Nelson Mobile Home Park shall inform all its agents and employees and officers of the terms of this Order and shall educate them as to these terms and the requirements of the Fair Housing Act.

5. Within forty-five days of the date on which this Initial Decision and Order becomes final, Respondent Nelson Mobile Home Park shall pay damages in the amount of \$30,000 to Complainant Ana Hernandez to compensate her for the losses that resulted from Respondent's discriminatory activity.

6. Within forty-five days of the date that this Initial Decision and Order becomes final, Respondent Nelson Mobile Home Park shall pay a civil penalty of \$5,000 to the Secretary, United States Department of Housing and Urban Development.

7. Within fifteen days of the date that this Order becomes final, Respondent Nelson Mobile Home Park shall submit a report to HUD's Atlanta Regional Office of Fair Housing and Equal Opportunity that sets forth the steps it has taken to comply with the other provisions of this Order.

8. Immediately upon the receipt of this Order, Respondent Nelson Mobile Home Park shall remove all signs restricting occupancy of Nelson Mobile Home Park on the basis of familial status or age and shall refrain from posting such signs.

This Order is entered pursuant to the applicable section of the Fair Housing Act, which is codified at 42 U.S.C. Section 3612 (g) (3), and HUD's regulation that is codified at 24 C.F.R. § 104.910, and it will become final upon the expiration of 30 days or the affirmance, in whole or in part, by the Secretary within that time.

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WILLIAM C. CREGAR  
Administrative Law Judge

Dated: December 2, 1993.